

<b>TYRONE GRINES</b>	)	
Claimant	)	
VS.	)	
	)	
<b>CONTINENTAL BAKING COMPANY</b>	)	Docket No. 199,881
Respondent	)	
AND	)	
	)	
<b>TRAVELERS INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

The Special Administrative Law Judge awarded claimant permanent partial disability benefits for a 60 percent work disability. The respondent and its insurance carrier requested review of the issue of nature and extent of injury and disability. That is the only issue now before the Appeals Board.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award entered by the Special Administrative Law Judge should be modified.

The Appeals Board agrees with the Special Administrative Law Judge's finding that claimant injured his neck in a January 2, 1993, work-related accident. Based upon claimant's testimony and the medical history taken two days after the accident by the company physician, Mary E. Brothers, M.D., the Appeals Board finds that claimant fell on the date alleged causing injury to his neck. Although claimant's injury was initially diagnosed as a strain, claimant's symptoms developed to the point that he was ultimately diagnosed as having a herniated cervical disc at the C5-C6 intervertebral level.

The respondent and its insurance carrier argued that claimant's cervical disc problem could not be related to the January 1993 accident because claimant did not seek medical treatment between March 1993 and January 1995. Although that fact does raise some question, respondent's own company doctor, Dr. Brothers, established the relationship between the January 1993 accident and claimant's present problems. As Dr. Brothers testified, in the absence of proof of any other intervening accident, she believes claimant's present symptomatology is related to the January 2, 1993, incident. Further, the record is devoid of any evidence to establish an intervening accident.

The respondent argues that claimant's version of the facts surrounding the accident and other matters is inconsistent with the testimony of other witnesses and, therefore, must be totally disregarded. The Appeals Board disagrees. Although claimant may tend to exaggerate, the Appeals Board is unable to find that claimant's testimony is so incredulous as to be completely ignored. Claimant testified that he continued to experience symptoms in his neck region when he returned to work after the January accident and even missed work on numerous occasions during 1993 and 1994 as a result of his neck injury. Claimant also denies sustaining any accident or injury after the January 1993 work-related incident. Respondent's own records tend to corroborate claimant's statements that after the accident he missed a number of days of work.

After the latest evaluation in 1995, Dr. Brothers determined that claimant had a herniated cervical disc and assigned claimant a 10 percent whole body functional impairment rating utilizing the Third Edition of the AMA Guides to the Evaluation of Permanent Impairment. That rating took into consideration certain of claimant's inconsistencies. Dr. Brothers believes that claimant should be restricted from lifting over 20-30 pounds and only lift with proper body mechanics, be restricted from lifting with only the left arm, and be restricted from lifting at or above the shoulder level. This doctor believes claimant retains the ability to work as an over-the-road driver if he were not required to handle freight.

Claimant's expert medical witness, orthopedic surgeon Edward J. Prostic, M.D., testified that he believes claimant injured his neck in the January 1993 accident and that

claimant has developed a symptom magnification disorder. Utilizing the AMA Guides, Dr. Prostic believes claimant has a 20 percent functional impairment for the physical injury and should observe the following work restrictions and limitations: avoid lifting greater than 40 pounds at any time or 20 pounds repetitively, avoid heavy carrying or lifting with the left arm, avoid work that requires the head to be away from the neutral position, and avoid use of vibrating equipment which includes prolonged riding in a motor vehicle. Dr. Prostic attempted to exclude that component related to the symptom magnification in formulating his opinions concerning both functional impairment and work restrictions.

Because his is an "unscheduled" injury, the computation of permanent partial disability benefits is governed by K.S.A. 1992 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment. . . . There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Claimant testified that he continued to work for the respondent after his injury until his termination in April 1995. During the period between January 1995 and April 1, 1995, respondent accommodated claimant with the light duty job of answering telephones. Respondent terminated claimant after advising him that the company could no longer accommodate his permanent medical restrictions. At that time, respondent had a company policy that only five weeks of light duty work would be provided an injured employee.

Respondent's shipping superintendent, Kenneth Luby, testified that the medical restrictions placed upon claimant by Dr. Brothers prevented claimant from performing his former job as a transport operator and any of the other bid jobs in that union shop.

At the time of regular hearing, claimant was unemployed and had not been offered accommodated employment by respondent despite claimant's inquiries. Claimant's vocational consultant, Gary Gammon, testified that claimant lost approximately 40 percent of his ability to perform work in the open labor market considering the medical restrictions from Dr. Brothers and Dr. Prostic. Mr. Gammon believes claimant's restrictions eliminate the jobs in the very heavy, heavy, and medium physical demand levels. Mr. Gammon also believes claimant's loss of ability to earn a comparable wage is 76 percent excluding consideration of fringe benefits, and 80 percent including consideration of fringe benefits. These conclusions are based upon the belief that claimant's injuries and very limited education would prevent him from obtaining jobs paying more than \$5 per hour. The parties

stipulated that claimant's average weekly wage consisting of base earnings and overtime is \$829.26 and that claimant received additional compensation items worth \$143 per week.

The respondent argues that Mr. Gammon's opinions cannot be used because he did not consider the Missouri open labor market. The Appeals Board finds that although the Missouri labor market might be relevant and might properly be considered, Mr. Gammon's failure to utilize that open labor market does not require the Appeals Board to disregard his analysis. Mr. Gammon's opinions of loss of ability to perform work in the open labor market and loss of ability to earn a comparable wage are uncontroverted.

Based upon the entire record, the Appeals Board finds that claimant is entitled to permanent partial disability benefits for a 15 percent functional impairment until his termination on April 1, 1995. The 15 percent functional impairment rating falls between the ratings provided by Drs. Brothers and Prostic and appears reasonable based upon the objective findings. For the period commencing April 1, 1995, the Appeals Board finds that claimant is entitled to permanent partial disability benefits for a 60 percent work disability which is an average of the 40 percent loss of ability to perform work in the open labor market and the 80 percent loss of ability to earn a comparable wage as mentioned above. When respondent discontinued claimant's accommodated employment as of April 1, 1995, the presumption of no work disability contained in K.S.A. 1992 Supp. 44-510e was overcome. See Lee v. Boeing Co. - Wichita, 21 Kan. App. 2d 365, 899 P.2d 516 (1995).

For purposes of computation of benefits, claimant's average weekly wage is \$829.26 for the period through October 6, 1995. As of October 7, 1995, claimant's average weekly wage is \$972.26 because on that date the respondent terminated the additional compensation items claimant received.

The findings of the Special Administrative Law Judge are adopted by the Appeals Board as its own to the extent they are not inconsistent with the above.

#### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated May 31, 1996, entered by Special Administrative Law Judge Douglas F. Martin should be, and hereby is, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Tyrone Grines, and against the respondent, Continental Baking Company, and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred January 2, 1993, and based upon an average weekly wage of \$829.26 through October 6, 1995, and an average weekly wage of \$972.26 after that date, for 26 weeks of temporary total disability compensation at the rate of \$299 per week or \$7,774.00, followed by 90.86 weeks of permanent partial compensation at the rate of \$82.93 per week in the sum of \$7,535.02 for

a 15% functional impairment and 283.25 weeks at the rate of \$299 per week or \$84,690.98 for a 60% work disability making a total award of \$100,000.

As of November 15, 1996, there is due and owing claimant 26 weeks of temporary total disability compensation at the rate of \$299 per week, or \$7,774.00; followed by 90.86 weeks of permanent partial compensation at the rate of \$82.93 per week, or \$7,535.02, for a 15% functional impairment; and 85 weeks at the rate of \$299 per week, or \$25,415.00, for a 60% work disability for a total due and owing of \$40,724.02 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$59,275.98 is to be paid for 198.25 weeks at the rate of \$299 per week until fully paid or further order of the Director.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of November 1996.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: Keith L. Mark, Mission, KS  
Joseph R. Ebbert, Kansas City, KS  
Douglas F. Martin, Special Administrative Law Judge  
Office of Administrative Law Judge, Topeka, KS  
Philip S. Harness, Director